

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SEAN P.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2010090981

**DECISION**

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 26, 2011, in Torrance.

Claimant was represented by his mother and father.<sup>1</sup>

Kathleen Richards, Program Manager, represented Harbor Regional Center (Service Agency or HRC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on January 26, 2011.

**ISSUE**

Whether claimant is eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

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<sup>1</sup> Claimant and his parents are identified by first name and last initial, or by title, to protect their privacy.

## EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits A-O; Claimant's exhibits 1-4.

Testimonial: Susan Laird, program manager; Dorla Watson, program manager; and claimant's mother and father.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Claimant is a boy who turned three years old on August 17, 2010. Claimant lives in the family home with his mother and father. Claimant is their first child.

2. On August 23, 2010, the Service Agency notified claimant's parents of its determination that claimant is not eligible for regional center services because he does not meet the criteria for eligibility set forth in the Lanterman Act. On September 22, 2010, claimant's mother filed a fair hearing request, on behalf of claimant, to appeal the Service Agency's determination regarding eligibility. This fair hearing ensued.

### *Claimant's Background*

3. Prior to age three, claimant was evaluated by the Eastern Los Angeles Regional Center (ELARC) for service eligibility under the Early Intervention Services Act, commonly referred to as Early Start. By letter dated May 10, 2010, ELARC notified claimant's parents that it had found claimant eligible for services under the Early Start program. Claimant did not receive Early Start services, however, because his family moved from ELARC's catchment area before the services could begin.

4. In June 2010, claimant's case was transferred from ELARC to HRC. HRC conducted an occupational therapy evaluation and found claimant was eligible for Early Start services due to expressive language delays. Pursuant to an individual/family service plan (IFSP) dated June 16, 2010, HRC agreed to fund for claimant to attend the Newport Language and Speech Center from July 2010 until August 2010. Since the Newport services were funded under the Early Start program, HRC was not authorized to continue funding the services under the Early Start program past claimant's third birthday on August 17, 2010. Any services provided by HRC to claimant after age three would have to be authorized under the Lanterman Act.

5. In July 2010, HRC referred claimant for a psychological evaluation by Twila Clark, Ph.D., BCBA, for the purpose of assisting HRC in determining claimant's eligibility for regional center services under the Lanterman Act, and for the purpose of diagnostic clarification due to claimant's parents' concern about autism.

*Psychological Evaluation by Dr. Clark*

6. On July 19, 22, and 23, 2010, Dr. Clark performed a psychological evaluation of claimant and prepared a written report of her findings and recommendations. Dr. Clark reviewed background information, such as claimant's medical, family and educational history, reported behavioral concerns, and results of previous testing. Dr. Clark made behavioral observations of claimant at the test session and at a nearby park. She also administered the following tests: the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), which measures cognitive abilities; the Vineland Adaptive Behavior Scales-Second Edition (VABS-II), which measures adaptive functioning; the Childhood Autism Rating Scale (CARS); and the Autistic Diagnostic Observation Schedule, Module 1 (ADOS-1).

7. Claimant's test score results indicated his performance IQ and full-scale IQ were in the average range, with his nonverbal abilities significantly higher than his verbal skills. His overall adaptive functioning was measured in the borderline range of abilities. His daily living skills and communication skills were in the borderline range, with receptive language skills at the age equivalent of 17 months and expressive language skills at the age equivalent of 21 months. Claimant's socialization skills were in the upper limits of the borderline range. His motor skills were in the low average range.

8. Claimant was referred to Dr. Clark to determine if he qualified for a diagnosis of autistic disorder. On the CARS, claimant scored in the non-autistic range. Dr. Clark also assessed claimant using the ADOS-1, which is a structured behavioral measure used to elicit examples of play skills and socialization and language abilities for assessing autism spectrum disorders. On the ADOS-1, claimant's scores in the communication and reciprocal social interaction domains were below the cut off for identifying an autism spectrum disorder.

9. Dr. Clark observed that claimant used many single words and short phrases to label various items he saw and to make his wants known; he engaged in expressive babbling with true words interspersed; he made appropriate eye contact with her during the session, and he consistently integrated eye contact with his vocalizations to facilitate communication; he used some gestures to facilitate his communication; he inconsistently responded when his name was called; he smiled socially and during preferred activities; and he displayed a range of facial expressions to indicate different moods. Dr. Clark found it was easy to gain claimant's attention and he responded to her attempts at joint attention when she pointed out new items. Claimant also initiated joint attention by pointing distally to point out toys that were out of his reach. He frequently referenced the adults in the room to bring them into his play, and commented on the toys to the adults. He initiated and sustained social games with Dr. Clark and enjoyed the attention he received. He displayed pretend play with different toys and imitated actions with toys. Dr. Clark observed that claimant engaged in repetitive hand flapping when excited. She found claimant tolerated the session well with no tantrum behavior noted.

10. Dr. Clark also interviewed claimant's mother using the DSM-IV-TR diagnostic criteria for autistic disorder. Dr. Clark found that the results of that interview and her own observations of claimant "revealed a few characteristics associated with autism including flapping his hands when he is excited." Dr. Clark opined, however, "that the extent and severity of these symptoms is not sufficient to warrant an autism spectrum diagnosis." In Dr. Clark's opinion, claimant's diagnosis is mixed receptive-expressive language disorder, because he displayed receptive and expressive language delays beyond what would be expected given his nonverbal cognitive abilities.

#### *HRC Eligibility Review Committee*

11. On August 16, 2010, the HRC eligibility review committee reviewed claimant's entire case record, which included the report of Dr. Clark's psychological evaluation and other current assessments including reports from Newport Speech and Language Center and Kaiser Permanente. The eligibility review committee determined claimant is not eligible for regional center services after the age of three. The committee determined that claimant has a language delay but does not have a qualifying developmental disability under the Lanterman Act. HRC notified claimant's parents of this decision by letter dated August 23, 2010.

#### *Evaluation by Kaiser Permanente*

12. On February 9, 2010, claimant was seen at Kaiser Permanente (Kaiser) for a developmental evaluation due to concerns about language delays and behavioral concerns. Amalia G. Mena, Psy.D., a clinical psychologist, prepared a Developmental Intake report which summarized the findings and recommendations of the evaluation.

13. The instruments used for the evaluation were a child history intake questionnaire completed by claimant's mother, behavioral observation, the ADOS-1, and the CARS. In addition, claimant had a medical examination by the Autism Multidisciplinary Team Physician, which the documentary evidence indicated was Cindy Evans, M.D., as well as evaluations for speech and language and occupational therapy.

14. Dr. Mena's written report indicates a one hour behavioral observation of claimant was conducted. Claimant did not respond to his name with consistency. He demonstrated eye gaze that was limited in flexibility and contexts. When the examiner presented him with a pop-up toy, claimant used the examiner's hand and placed it over the toy on a few occasions to get her to operate it. Claimant did not display much interest in engaging in cooperative or joint play and instead became self-absorbed with the toys available to him. His range of facial expressions was limited, and he was only observed to smile and demonstrate discomfort when a mechanical toy was presented. Despite numerous opportunities to engage with the examiner or his mother, claimant did not initiate joint attention during the one hour observation. Rapport was only briefly sustained. In the area of communication, claimant was observed to use few words. Most of his language consisted of gibberish. In terms of nonverbal communication, claimant briefly demonstrated a distal

point to request more bubbles. He did not use pointing to share attention and did not sustain coordinated eye contact when pointing. Repetitive motor mannerisms were observed at high frequency, including body tensing and finger posturing when he was excited and brief hand flapping. Claimant demonstrated difficulty with using cause-effect toys and limited ability to sustain functional play. He was observed to line up cars briefly, and evidenced a fear response when presented with mechanical toy items.

15. Based on its evaluation of claimant, Kaiser concluded that claimant met the criteria for a diagnosis of "autism, mild." On the CARS, claimant's score placed him in the mildly-moderately autistic range. On the ADOS-1, claimant's scores indicated deficits consistent with autistic disorder.

#### *Newport Language and Speech Center*

16. On July 21, 2010, claimant began attending group speech/language with an occupational therapy component, at Newport Language and Speech Center, two times weekly, for two hour sessions. Claimant had goals to improve his pre-language, receptive, and expressive language skills.

17. On August 23, 2010, Newport Language and Speech Center prepared a Regional Center Discharge Summary Report for claimant. The Report notes that claimant improved his pre-language skills and was able to participate with gross motor movements during music, sit, attend, and transition during group therapy with minimal prompting. Receptively, claimant could identify vocabulary by pointing to items with 80 percent accuracy, understand verbs in context with greater than 60 percent accuracy, and follow two-step commands given a gesture cue with 75 percent accuracy. He continued to demonstrate difficulty with understanding size concepts. Expressively, claimant could name items in a category given a choice cue with greater than 60 percent accuracy; he inconsistently labeled items spontaneously; he could respond to requests to imitate one and two word utterances; and he used words spontaneously more than five times spontaneously during therapy. The Report also notes that claimant made appropriate eye contact, interacted during play with same aged peers, and used toys during play appropriately. Claimant was occasionally observed hand flapping, but only for a very brief period of time, lasting two to four seconds. The Report recommended "[c]ontinued speech and language therapy" for claimant.

#### *Evaluation by School District*

18. In or about November 2010, claimant was referred to Bellflower Unified School District to determine his eligibility for special education services. Claimant underwent an initial multi-disciplinary evaluation by school psychologist Vanessa Velasco, M.A., and Sandra B. Lex, a speech and language pathologist. These examiners found claimant is not eligible for special education services at this time.

19. The assessment results found claimant's adaptive behavior was in the deficient range; his social-emotional skills and cognitive abilities were in the low-average range; and his fine and gross motor skills were in the average range. In the area of language and communication, claimant exhibited a mild delay in receptive language and scored in the borderline to low-average range in expressive language, but his communication skills were found to be commensurate with his overall functioning. Speech and language services were not recommended at this time. Claimant was not assessed for autism by these examiners, since Dr. Clark had just assessed him for autism in July.

20. During this evaluation, claimant was cooperative and responded to instructions; he required redirection, at times, and was reluctant to participate, at times, especially if he was focused on a particular toy; he demonstrated verbal and nonverbal forms of communication to get his needs met or simply to engage with the examiners; he appropriately asked for items or responded when prompted by his mother; he appeared to enjoy bubbles as he was observed smiling and jumping; he was observed flapping his hands quite frequently when he was excited; and he demonstrated joint attention by looking at his mother to show her a particular toy. The examiners found that claimant demonstrated several pre-academic skills, as well as other skills that could have been better measured had he attended better to tasks.

#### *Occupational Therapy Assessment*

21. On September 30, 2010, Crystal M. Brown, O.T., conducted an occupational therapy assessment of claimant. Ms. Brown's report noted that the claimant's parents were concerned about his hand flapping, he would not consistently initiate play with peers, and he would only engage for a short time. Ms. Brown observed that claimant had reduced eye contact, he was cooperative and attentive to all presented tasks, he transitioned well, and his speech was primarily jargon with some clear words.

22. Based on her assessment of claimant, Ms. Brown found that claimant exhibited "good emerging skills" in the area of cognition and fine motor skills. He exhibits joint attention occasionally. He engaged in parallel play and in reciprocal play (with prompting). During play, claimant was observed to line things up. Ms. Brown observed hand flapping once during the assessment. Based on parent report, the only concern in the area of sensory processing was auditory sensitivity, in that claimant covers his ears with certain noisy household appliances. Ms. Brown concluded, "Results of this assessment do not indicate a medical necessity warranting ongoing occupational therapy in a health care service environment."

#### *Testimony of Susan Laird*

23. Susan Laird is a program manager at the Service Agency. She has worked at HRC for 21 years. She holds a master's degree in public administration, and a bachelor's degree in psychology and communication. Claimant's case was part of the case load she supervised last year. She is familiar with his services and eligibility decisions.

24. Around the time of the Service Agency's decision finding claimant not eligible for regional center services, Ms. Laird contacted Kym Asahara, Speech/Language Pathologist at Newport Language and Speech Center to find out her impressions of claimant. According to Ms. Laird, Ms. Asahara found that claimant did not show characteristics for autism, but there were concerns about his speech and language skills.

25. Ms. Laird reviewed the documentary evidence presented at the hearing, including the reports by Dr. Clark, Kaiser, the Bellflower school district, and Newport Language and Speech Center. Based on her review, Ms. Laird found that the behavioral observations of claimant by Dr. Clark and the school district were consistent. Based on her experience, Ms. Laird attributed the different diagnoses by Kaiser and Dr. Clark, respectively, to the fact that claimant grew, developed and matured between the time of Kaiser's evaluation in February 2010 and Dr. Clark's evaluation in July 2010. Based on her experience, she has seen that children sometimes make a lot of progress before reaching age three. She also notes that claimant's program at Newport Language and Speech Center had a good effect on claimant, as he was in a setting with typical and non-typical developing children. According to Ms. Laird, it is not unusual for a child in that type of setting to progress and develop quickly.

26. According to Ms. Laird, at the time the Service Agency determined that claimant was not eligible for regional center services, it did not know the school district's decision on claimant's eligibility for special education services. Ms. Laird opined that the Service Agency's decision is appropriate, given that the evaluations by Dr. Clark, the school district, and Newport Language and Speech Center were all consistent in their reports of claimant's behaviors and mannerisms.

#### *Testimony of Claimant's Parents*

27. Claimant's mother testified at the hearing. She spends all day with claimant. She feels he tries to learn to do things, but still has problems. He cannot alternate pushing his feet and peddle a bicycle. He struggles with dressing and putting on his shoes. Mother finds that claimant gets overwhelmed in new environments or when meeting new people; he hides behind Mother or closes his eyes. Mother finds that claimant gets extremely fussy and will not stay still when she takes him to new places. She notes that when HRC and the school district evaluated claimant, there were always toys around, which calmed him down. Mother has found that if there are no toys around, then claimant gets fussy and will not pay attention.

28. Mother was present during the respective evaluations conducted by Dr. Clark and by Kaiser. Mother notes that, although Dr. Clark's report indicates the evaluation occurred over three days, she did not evaluate claimant on all three days. The first day was in her office, the second day was in a nearby park where no other children were present, and the third day was a short visit in which Dr. Clark told Mother the results of testing. Mother testified the Kaiser evaluation was a three-hour evaluation in which claimant was seen by three people. Mother feels that claimant is a child who needs help.

29. Claimant's father testified at the hearing. He works outside the home. According to Father, claimant is not potty-trained and does not let his parents know when his diaper needs to be changed. He has a short attention span and is easily distracted by other things, such as cartoons, videogames, and toys. Father feels claimant's hand flapping has not diminished. Claimant used to stop hand flapping when his parents told him to stop; now he does not stop. According to Father, claimant speaks only in two to three word phrases, and he has only shown minimal improvement with speech therapy. Claimant's attention span towards his parents is poor. According to Father, claimant does not look him in the eyes during conversation. Claimant will turn to look when a new person calls his name, but not when his parents call his name. Father feels that claimant will cooperate with testing in order to play with toys that are available in the testing area.

## LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>2</sup> A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-5.)

2. Eligibility for services under the Lanterman Act exists when an individual establishes that he or she suffers from a developmental disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the "fifth category" (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one's eighteenth birthday, continue indefinitely thereafter, and constitute a substantial disability for the individual. (§ 4512; Cal. Code Regs., tit. 17, § 54000, subds. (a) & (b).)

3. California Code of Regulations, title 17, section 54001, subdivision (a), defines "substantial disability" to mean:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.



following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

4. The determination of eligibility for services under the Lanterman Act is made by the regional center. "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources." (§ 4643, subd. (b).)

5. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. "Preponderance of the evidence" means evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. (BAJI No. 2.6 (8th ed. 1994).) Thus, claimant has the burden of proving his eligibility under the Lanterman Act by a preponderance of the evidence. Claimant did not meet his burden.

6. It was not established by a preponderance of the evidence that claimant suffers from a developmental disability that qualifies him for regional center services under the Lanterman Act. The evidence of Kaiser's diagnosis of mild autism is not of greater weight or more convincing than the evidence offered in opposition to it (i.e., the evaluation by Dr. Clark). In her report, Dr. Clark acknowledged that claimant exhibited characteristics of autism, but not to such an extent or severity as to support an autism diagnosis. Dr. Clark's diagnosis of mixed receptive-expressive language disorder is more convincing and better explained than the Kaiser diagnosis. The weight of all the evidence in this case supports the Service Agency's determination that claimant is not eligible for services under the Lanterman Act. Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied.

DATED: May 25, 2011

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ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

**This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**